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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD FISO, Defendant and Appellant.	F068658 (Super. Ct. No. VCF285583) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. H. N. Papadakis, Judge. (Retired Judge of the Fresno Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jamie A. Scheidegger, Deputy Attorneys General, for Defendant and Appellant.

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FACTUAL BACKGROUND

Defendant Richard Fiso was arrested following an attack on his girlfriend, Stacy M., on July 14, 2013.[1] That day, he threatened by phone to kill Stacy and her daughters. Stacy then left her house and drove around with two of her daughters because she felt unsafe. After defendant threatened to trash her house if she did not return, she drove back. As she pulled into the driveway, she told one of her daughters to call 911. Defendant got "a wild look" on his face and ran toward the truck she was driving.

As Stacy began backing out of her driveway, defendant jumped on the hood, ripped the wiper blades off, knocked out the window on the driver's side and dragged Stacy out of the truck by her hair. The vehicle was still rolling and as she was pulled from the vehicle, Stacy fell and became entangled in her seatbelt. She hit her head on the ground and was run over by the truck. After the truck hit a curb and stopped, defendant got in and drove back and forth with Stacy underneath the truck still entangled in her seatbelt. Her daughters were able to get out of the truck, and a neighbor freed Stacy from her seatbelt and pulled her out of the way.

Defendant then drove off in the truck, but crashed into a tree several blocks away. He turned himself in later that day.

PROCEDURAL BACKGROUND

Defendant was charged by information with attempted murder (Pen. Code, §§ 664, subd. (a) & 187, subd. (a))[2] (count 1), carjacking (§ 215, subd. (a)) (count 2), assault with a deadly weapon (§ 245, subd. (a)(1)) (count 3), and domestic battery (§ 273.5, subd. (a)) (count 4). As to count 1, the offense was alleged to be premeditated (§ 664); and as to all four counts, the offenses were alleged to be serious felonies within the meaning of

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1 Because the facts underlying defendant's convictions are not relevant to resolution of the issues he raises on appeal, we only briefly summarize them.

2 Further statutory references are to the Penal Code unless otherwise noted.

sections 1192.7, subdivision (c), and 667.5, subdivision (c), based on defendant's personal use of a deadly weapon (vehicle) (§ 12022, subd. (b)(1)), and personal infliction of great bodily injury (§ 12022.7, subd. (e)). The information also alleged defendant had suffered one prior serious and/or violent felony conviction under the three strikes law (§§ 667, subds. (b)–(i) &1170.12, subds. (a)–(d)) and one prior serious felony conviction (§ 667, subd. (a)(1)).

After defendant waived his right to a jury trial on the truth of the prior felony conviction allegation, the jury convicted him on all four counts and found the special allegations true except for the premeditation allegation to count 1, on which they were unable to reach a verdict. In the subsequent bifurcated proceeding, the trial court found defendant's prior felony conviction for second degree robbery true. The trial court also found that prior conviction, which was incurred in the State of Washington, qualified under California law as a serious and/or violent felony under the three strikes law (§§ 667, subds. (b)–(i) & 1170.12, subds. (a)–(d)) and a serious felony (§ 667, subd. (a)(1)).

The trial court sentenced defendant to 18 years on count 1 (upper term, doubled for the prior strike conviction), plus five years for the prior serious felony conviction enhancement and five years for the great bodily injury enhancement; and three years four months on count 2 (one-third of the midterm, doubled for the prior strike conviction), plus three years for the deadly weapon enhancement, for a total determinate term of 34 years four months. Sentences on counts 3 and 4 were stayed (§ 654).

On appeal, defendant argues there is insufficient evidence supporting the trial court's finding that his prior Washington State robbery conviction qualifies as a strike and a serious felony under California law. Defendant also argues the trial court erred in sentencing him to the full upper term on the deadly weapon enhancement to count 2; erred in imposing and staying the serious felony enhancement as to counts 2, 3, and 4; and erred in issuing an indefinite protective order. Finally, defendant argues the trial

court abused its discretion by failing to conduct a "proper hearing" pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) when he complained his trial counsel was ineffective.

We find the trial court erred in determining that defendant's prior out-of-state conviction qualifies as a strike and a serious felony under California law based merely on the fact of the conviction. We reverse this determination, and remand for another proceeding and/or resentencing. Based on this finding, we conclude defendant's challenge to the imposition of a prior serious felony enhancement for each count is moot.

Further, we find the trial court erred in sentencing defendant to the full three-year term for the deadly weapon enhancement on count 2, rather than imposing a sentence of one-third of the aggravated three-year term selected. (§§ 1170.1, subd. (a), 12022, subd. (b)(2).) Finally, we find defendant's challenge to the protective order is moot and the trial court did not abuse its discretion on the *Marsden* issue.

DISCUSSION

I. Sufficiency of Evidence Supporting Prior Strike and Serious Felony Finding

A. Background

On January 18, 2006, defendant pled guilty to second degree robbery in the State of Washington (Wash. Rev. Code, §§ 9A.56.210 & 9A.56.190). Following defendant's convictions on counts 1 through 4 in this case, the prosecutor provided a certified Washington State judgment of felony conviction and sentence for second degree robbery. Neither party submitted any additional evidence and both parties submitted on the evidence without argument.

The trial court then found the fact of the prior conviction true and found it qualifies as a prior strike and serious felony under California law. (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d), 667, subd. (a)(1).) The parties agreed the trial court's statement of the finding was sufficient, and defense counsel stated, "Yes, on the record the

defendant did serve a time in a penal institution in the state of Washington on that conviction."

On appeal, defendant argues there is insufficient evidence supporting the trial court's finding that the Washington State robbery conviction qualifies as a strike and serious felony under California law. Defendant contends that unlike in California, intent to permanently deprive the victim of the property is not an element of second degree robbery in Washington and, therefore, reliance on the mere elements of the offense do not show the prior conviction qualifies as a prior strike and a serious felony. We must presume, he contends, that he was adjudicated as to the least punishable offense, which does not include the permanency element, and the enhancements to his sentence based on the prior conviction must be stricken.

Relying on a Court of Appeal case finding the Arizona robbery statute satisfied the intent requirement under California law and a Washington State Court of Appeal case finding the Arizona robbery statute is equivalent to second degree robbery under Washington law, the People argue that defendant's position lacks merits. They reason that since section 211 includes categories of robberies requiring intent to temporarily deprive, the California and Washington statutes are, by analogy, equivalent.

In reply, defendant states that California law does not encompass the least adjudicated elements of the Washington statute. Defendant agrees that the California and Arizona statutes, which are "more exacting," would satisfy Washington's robbery statute because it is less exacting, but the reverse is not true: Washington's robbery statute does not satisfy California's more exacting statute.

The parties agree retrial of the prior conviction allegations is permitted, should we determine the trial court's findings are not supported by sufficient evidence. (*People v. Barragan* (2004) 32 Cal.4th 236, 239; *Monge v. California* (1998) 524 U.S. 721, 724; *People v. Marin* (2015) 240 Cal.App.4th 1344, 1366.)

B. Standard of Review

"The People must prove all elements of an alleged sentence enhancement beyond a reasonable doubt." (*People v. Miles* (2008) 43 Cal.4th 1074, 1082.) "On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067; *People v. Saez* (2015) 237 Cal.App.4th 1177, 1189.)

C. Analysis

California law provides that "[a] prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison shall constitute a prior conviction of a particular serious and/or violent felony if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7." (§§ 667, subd. (d)(2), 1170.12, subd. (b)(2).) In addition, "any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." (§ 667, subd. (a).)

In determining whether a prior conviction from another jurisdiction includes all of the elements required to constitute a qualifying felony under California law, courts employ an elements based categorical approach. (*Descamps v. United States* (2013) __ U.S. __, __ [133 S.Ct. 2276, 2281] (*Descamps*); *People v. Denard* (2015) 242 Cal.App.4th 1012, 1024–1025; *James v. State of California* (2014) 229 Cal.App.4th 130, 136–137.) "[I]f the foreign law can be violated in different ways, and '"the record does

not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law.""" (*People v. Denard*, *supra*, at p. 1024; *People v. Saez*, *supra*, 237 Cal.App.4th at pp. 1193–1194.)

"In California, robbery is defined as 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.'" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1117.) The "felonious taking element … is the intent to steal, or to feloniously deprive the owner permanently of his or her property." (*Ibid.*) "[T]he intent to deprive permanently is [also] satisfied by the intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of the value or enjoyment." (*Ibid.*)

Under the statute in effect at the time of his conviction in Washington, "[a] person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear."[3] (Wash. Rev. Code, § 9A.56.190.) Robbery under Washington State law, however, does not require intent to "'permanently deprive' in the offense of theft by taking." (*State v. Komok* (1989) 113 Wn.2d 810, 817; accord, *State v. Crittenden* (2008) 146 Wn.App. 361, 370.) It merely requires intent to commit theft. (*State v. Richie* (2015) 191 Wn.App. 916, 922.)

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3 Effective July 22, 2011, the statute was amended to make it gender neutral. (*State v. Witherspoon* (2014) 180 Wn.2d 875, 883, fn.2.)

The elements of second degree robbery in Washington are, therefore, broader than the elements of second degree robbery in California, and defendant's conviction, at least arguably, could have been based on conduct that would not have constituted robbery under California law. Thus, the mere fact of defendant's prior robbery conviction—which is all the trial court had before it to consider—did not establish that it qualifies as a strike under California law. (*People v. Denard, supra,* 242 Cal.App.4th at pp. 1024–1026.) We conclude the trial court's determination is not supported by substantial evidence and this matter must be remanded for a determination whether the prior conviction qualifies as a strike and serious felony under California law and/or resentencing. (*People v. Marin*, *supra*, 240 Cal.App.4th at pp. 1351, 1364; see *People v. McCaw* , review granted Oct. 19, 2016, S236618).)

The People do not concede this issue, but the only argument they advance in support of affirming the trial court's finding is unpersuasive. As the People contend, in *People v. Mumm* (2002) 98 Cal.App.4th 812, 818–819, a California Court of Appeal found that because Arizona's robbery statute contained all of the elements of California's robbery statute, the defendant's prior Arizona conviction qualified as a strike; and in *State v. Russell* (2001) 104 Wn.App. 422, 444–446, a Washington Court of Appeal found that an Arizona conviction for robbery, class 4, was comparable to a Washington conviction for second degree robbery because every element of the Arizona statute was contained in Washington's statute. However, it does not necessarily follow, as the People suggest, that the Washington and California robbery statutes are, therefore, equivalent. Washington's second degree robbery statute is broader than California's statute, as explained *ante*, and while additional or more specific statutory elements may satisfy broader statutory elements, the reverse is not true. (*People v. Denard, supra,* 242 Cal.App.4th at pp. 1024–1025.)

As we recently recognized in *People v. Johnson* (2016) 244 Cal.App.4th 384, 390–391, footnote 6, a number of Courts of Appeal have considered the impact of the

United States Supreme Court's decision in *Descamps* on the California Supreme Court's decision in *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*) and the trial court's ability to consider the record of a prior conviction in determining whether the conviction qualifies as a strike. We do not have that issue squarely before us in this case, however, and we limit our decision to the issue raised on appeal: whether substantial evidence supports the trial court's finding that the prior Washington State robbery conviction qualifies as a strike and serious felony under California law. What parts of the record the trial court may or may not look to, and/or what issues must be tried by jury under the Sixth Amendment, were neither considered by the parties and the trial court below nor raised on appeal.

The facts underlying defendant's prior robbery conviction are not in the record because, as we explained, the People offered evidence of only the fact of the conviction and the trial court concluded from that fact that the offense qualified as a strike and serious felony under California law, without any analysis of the law under either state's statute. We find it appropriate for the trial court to reconsider the issue in the first instance because the People bear the burden of proving the sentence enhancements and the trial court's actions will necessarily be dictated by the elections the parties make upon remand. We observe that any factfinding determined to be necessary regarding the prior robbery conviction involves the intersection of *Descamps* and *McGee*, and several California Courts of Appeal, including this court, have already directly addressed the issue. (*People v. Navarette* (2016) 4 Cal.App.5th 829; *People v. Denard*, *supra*, 242 Cal.App.4th 1012; *People v. Marin*, *supra*, 240 Cal.App.4th 1344; *People v. Saez*, *supra*, 237 Cal.App.4th 1177; *People v. Wilson* (2013) 219 Cal.App.4th 500; see *James v. State of California*, *supra*, 229 Cal.App.4th at p. 137, fn. 6; see also *People v. McCaw*, *supra*, review granted Oct. 19, 2016, S236618.)

II. Sentencing Errors

A. Deadly Weapon Enhancement on Subordinate Term

The jury found the special allegation that defendant used a deadly weapon true. Pursuant to section 12022, subdivision (b)(2), the trial court had the discretion to select a term of one, two or three years for the enhancement. However, for any subordinate term, the sentence enhancement is limited under section 1170.1, subdivision (a), to one-third of the term selected. (*People v. Sasser* (2015) 61 Cal.4th 1, 16.)

Count 1 was the principal term in this case. In sentencing defendant for the deadly weapon enhancement to count 2, a subordinate term, the trial court imposed the full aggravated term of three years rather than one-third of the aggravated term. The parties agree the court erred in this regard and defendant's sentence on the enhancement should be reduced to one year.

Accordingly, defendant's sentence for the deadly weapon enhancement on count 2 shall be modified to reflect it is one-third of three years, or one year. (§§ 1170.1, subd. (a), 12022, subd. (b)(2).)

B. Imposition of Multiple Prior Serious Felony Enhancements

For each of the four counts, the trial court imposed a five-year enhancement based on defendant's prior serious felony conviction (§ 667, subd. (a)). The enhancement was stayed for counts 2 through 4, and the abstract of judgment reflects one 5-year enhancement.

Defendant argues that prior serious felony conviction enhancements pursuant to section 667, subdivision (a), apply only once in a case, and the trial court erred in imposing and staying the enhancements as to counts 2, 3 and 4. Defendant requests the enhancements be stricken.

The People concede the trial court erred in imposing and staying the enhancement terms on multiple counts, but contend no further action is required because the abstract of judgment correctly reflects the imposition of only one enhancement term. Defendant

responds that the abstract of judgment merely memorializes the oral sentence pronouncement and the record should be corrected to reflect the imposition of only one 5-year enhancement.

As the parties agree, the trial court should have applied the five-year prior serious felony enhancement once to defendant's overall sentence. (*People v. Sasser*, *supra*, 61 Cal.4th at pp. 16–17.) Further, as defendant argues, it is the trial court's oral pronouncement that is the judgment of conviction. (*People v. Jones* (2012) 54 Cal.4th 1, 89; *People v. Delgado*, *supra*, 43 Cal.4th at p. 1070.) However, we need not further address the erroneously imposed prior serious felony conviction enhancements, as our reversal of the trial court's finding of a prior serious felony conviction under California law in part I. renders this issue moot. Should there be a finding on remand that defendant's prior Washington State felony conviction qualifies as a serious felony under California law, a five-year enhancement pursuant to section 667, subdivision (a), may only be imposed once on defendant's overall sentence. (*People v. Sasser*, *supra*, at pp. 16–17.)

III. Protective Order

During sentencing, the trial court issued a protective order prohibiting defendant from having any contact with the victims of his crimes, to "remain in effect until this Court determines otherwise." The protective order was then terminated on January 6, 2014.

Acknowledging the trial court had the discretion to issue a protective order under sections 136.2 and 273.5, defendant argues the court nonetheless erred in issuing an indefinite protective order because the duration of a protective order is limited by statute to 10 years.[4] Defendant requests the order be modified to reflect a 10-year maximum

[4] Sections 136.2 and 273.5 have been amended effective January 1, 2017, but the amendments are unrelated to the 10-year duration limitation. (Sen. Bill No. 1005 (2015-2016 Reg. Sess.) § 69; Sen. Bill No. 1171 (2015-2016 Reg. Sess.) § 220.)

expiration date. The People contend the issue is moot given the termination of the order on January 6, 2014. While defendant concedes the order was terminated, he argues we may still modify the original to reflect a lawful termination date.

"'An appellate court will not review questions which are moot and which are only of academic importance.' [Citations.] A question becomes moot when, pending an appeal from a judgment of a trial court, events transpire that prevent the appellate court from granting any effectual relief." (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 419.) Courts have the discretion, however, to address issues on the merits despite their mootness where the issues are of continuing public importance and are capable of repetition yet evading review. (*People v. Barrett* (2012) 54 Cal.4th 1081, 1092–1093, fn. 7; *Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 951, fn. 3; *Gonzalez v. Munoz, supra,* at p. 419; *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 611.)

In this case, the protective order was terminated by the trial court and there is no effective relief to be granted. Moreover, we can discern no arguable basis for finding the issue is one of continuing public importance. Defendant does not contend otherwise. We therefore dismiss defendant's appeal on this issue as moot. (*Babalola v. Superior Court, supra,* 192 Cal.App.4th at p. 951.)

IV. *Marsden* Hearing

Finally, defendant contends that the trial court erred in failing to hold a proper *Marsden* hearing and he seeks remand for a hearing. The People assert that defendant did not trigger the trial court's duty to hold a *Marsden* hearing because he did not clearly indicate he wanted a substitute attorney.

A. Standard of Review

"When a defendant seeks substitution of appointed counsel pursuant to … *Marsden, supra,* 2 Cal.3d 118, 'the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not

providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'" (*People v. Taylor* (2010) 48 Cal.4th 574, 599.) There must be "at least some clear indication by the defendant that he wants a substitute attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8; accord, *People v. Sanchez* (2011) 53 Cal.4th 80, 91.)

We review the denial of a *Marsden* motion for an abuse of discretion. (*People v. Loya* (2016) 1 Cal.App.5th 932, 944.) "In this context, an abuse of discretion does not exist unless the defendant's right to assistance of counsel was substantially impaired from the failure to replace the defendant's attorney." (*Ibid*.)

B. Analysis

At trial, defendant testified in his own defense. After he took the stand and defense counsel started to ask him the first substantive question, the following exchange occurred:

> "THE DEFENDANT: Okay, can you wait a minute, a second?
>
> "[DEFENSE COUNSEL]: Sure.
>
> "THE DEFENDANT: Your honor, I'd like to speak to you about like how I feel and believe that I've been given ineffective counsel for my attorney and I believe there are witnesses that have testified up here—
>
> "THE COURT: All right, sir, that's an improper statement before the jury.
>
> "THE DEFENDANT: I'm saying I would like to know, I'd like to take a lie detector test to—
>
> "THE COURT: [Defendant], those are improper comments to make before the jury.
>
> "THE DEFENDANT: We could take this up out of the presence of the jury, sir.
>
> "THE COURT: I'll have the jurors please step out for a moment. Keeping in mind you're not to discuss the case or anything about it with each other or anyone else. [¶] … [¶]

"THE COURT: We are now outside the presence of the jury. All right, [defendant], what is your issue?

"THE DEFENDANT: My issue is, man, I just feel like my—my attorney has not, you know, prepared me rightfully for this, this trial and I believe, I know and believe that there are witnesses that have been up here that have sworn testimony, taken a sworn oath, they've been up here, they lied, and I want to know if I can take a lie detector test to prove my innocence to the jury.

"THE COURT: Okay. First off, I will tell you it's backwards. Lie detector tests are inadmissible in trial on this date. They're not accepted in evidence and that would be inappropriate.

"Whether the witnesses lied or not, that's for the jury to figure out and that's what juries do, decide who they believe and who they don't believe.

"And your attorney has prepared your case. We have discussed that. There was an opportunity to have your case continued prior to trial; is that right?

"Right, Counsel?

"[DEFENSE COUNSEL]: That was … why, sir.

"[PROSECUTOR]: That's correct, Your Honor. There was a continuance request.

"THE COURT: And you didn't want to continue your trial, you wanted to proceed to trial. The Court did inquire if we should continue the case over your objection and the Court decided to accept your desire to proceed to your trial. The Court was satisfied that your attorney had reviewed all the evidence and was prepared to proceed to trial. The Court finds the lawyer—well I guess we need to put it on the record."

The court then asked defense counsel how long he had been practicing criminal law, the answer to which was 25 years, and made a finding that counsel was competent and properly prepared.

We need not decide whether defendant's initial statement was sufficient to trigger the duty to hold a *Marsden* hearing because the court held a sufficient hearing, albeit without identifying it by name. (*See People v. Hines* (1997) 15 Cal.4th 997, 1025 [A

Marsden hearing is "an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement."]; accord, *People v. Gutierrez* (2009) 45 Cal.4th 789, 803.) Defendant couches his argument in terms of not receiving a "proper hearing" because he was not allowed to air all of his complaints and because the prosecutor was present. The contention that defendant had more to say and was prevented from doing so by the trial court lacks any support in the record, however.

On the second point, we have recognized "'no single, inflexible procedure exists for conducting a *Marsden* inquiry,'" and the presence of the prosecutor is not necessarily of any consequence. (*People v. Lopez* (2008) 168 Cal.App.4th 801, 814.) "An in camera *Marsden* hearing is 'the better practice,' but a *Marsden* hearing in open court is permissible where, as here, neither the defendant nor defense counsel asks for an in camera hearing and the defendant's complaints neither disclose information that conceivably could lighten the prosecutor's burden of proof nor involve evidence or strategy to which the prosecutor is not privy." (*Id.* at p. 815.) Here, neither defendant nor his counsel indicated the need or desire for an in camera hearing, and defendant's complaint was limited to his belief he had not been adequately prepared for trial.

Defendant further contends the trial court's finding that his counsel was competent was improper. This case, however, does not involve a situation where defendant offered specific instances of misconduct or other grounds to discharge counsel only to have them overridden by the trial court based solely on its own observations. (*Marsden*, *supra*, 2 Cal.3d at pp. 123–124.)

"Once a defendant is afforded an opportunity to state his or her reasons for seeking to discharge an appointed attorney, the decision whether or not to grant a motion for substitution of counsel lies within the discretion of the trial judge. The court does not abuse its discretion in denying a *Marsden* motion '"unless the defendant has shown that a

failure to replace counsel would substantially impair the defendant's right to assistance of counsel."' [Citations.] Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when 'the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].'" (*People v. Clark* (2011) 52 Cal.4th 856, 912.)

Defendant advances no argument that his "right to assistance of counsel was substantially impaired" by the trial court's determination that his counsel was competent to represent him (*People v. Loya*, *supra*, 1 Cal.App.5th at p. 944; *People v. Sanchez*, *supra*, 53 Cal.4th at p. 90), and under the circumstances presented here, "'we find no basis for concluding that the trial court either failed to conduct a proper *Marsden* inquiry or abused its discretion in declining to substitute counsel'" (*People v. Smith* (1993) 6 Cal.4th 684, 697, fn. omitted).

DISPOSITION

The defendant's sentence is reversed. The appeal of the trial court's order imposing and staying multiple five-year prior felony conviction enhancements under section 667, subdivision (a), and the appeal of the protective order are dismissed as moot. The trial court's finding that defendant's prior Washington State felony conviction qualifies as a strike and a serious felony under California law is reversed and the matter is remanded for a new proceeding and/or resentencing. (*People v. Denard*, *supra*, 242 Cal.App.4th at pp. 1024–1025; *People v. Marin*, *supra*, 240 Cal.App.4th at p. 1366; see *People v. McCaw*, *supra*, review granted Oct. 19, 2016, S236618.) The court erred in failing to impose a sentence for the deadly weapon enhancement on count 2 of one-third the midterm, or one year. (§§ 12022, subd. (b)(2) & 1170.1, subd. (a).) The judgment is affirmed in all other respects. The superior court is directed to prepare an amended

abstract of judgment and transmit a copy to the appropriate authorities at the conclusion of the sentencing hearing.

_____
KANE, J.

WE CONCUR:

_____
LEVY, Acting P.J.

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DETJEN, J.